Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 304 of the	)	CS Docket No. 97-80
Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and	)	PP Docket No. 00-67
Consumer Electronics Equipment	)	

Consumer Electronics Industry Reply Comments

Joint Reply Comments Of The
Consumer Electronics Association
And The
Consumer Electronics Retailers Coalition
In Response To Further Notice
Of Proposed Rulemaking

April 28, 2003

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Consumer Electronics Industry Reply Comments

Joint Reply Comments Of The Consumer Electronics Association And The Consumer Electronics Retailers Coalition In Response To Further Notice Of Proposed Rulemaking

These Comments on the Commission's Further Notice of Proposed Rulemaking of January 10, 2003 are provided jointly by the Consumer Electronics Association (CEA) and the Consumer Electronics Retailers Coalition (CERC). They represent the views of the consumer electronics manufacturing and retail industries and associations, and are specifically endorsed by the major television manufacturers and consumer electronics specialty retailers.

In Comments filed jointly on March 28,[1] CERC and CEA stressed that:

- Congress instructed the Commission in 1992 to promote the *compatibility* of consumer electronics devices with cable services, and in 1996 to assure the *commercial availability* of navigation devices for all services provided by all Multichannel Video Programming Distributors;

- Finally achieving these goals will be of enormous benefit to consumers and a watershed in the DTV and HDTV transitions;

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[1] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97-80, *Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Further Notice of Proposed Rulemaking (Rel. January 10, 2003), Comments Of The Consumer Electronics Association And The Consumer Electronics Retailers Coalition (March 28, 2003).

- The items that are the subject of this FNPRM represent the culmination of a decade of Commission rulings, orders, and declarations. Absent more intensive and intrusive regulation, there is literally no other option left for achieving Congress's intentions and maintaining consistency with Commission rulings and orders to date.

- Congress's mandates and expectations have established a clear, firm, and specific jurisdictional basis for the Commission to act, expeditiously, to achieve this result.

CEA and CERC have studied the March 28 comments with acute interest. They were relieved to conclude that nothing in any of these comments undermines or casts any doubt on the strong, imperative, fundamental case for expeditious and affirmative action by the Commission. In these Reply Comments, CEA and CERC deal point by point with those concerns and considerations that were raised. Some basic, initial observations:

- Many comments are based on desires to clarify rather than oppose.

- Some are based on misunderstandings over the subject matter addressed, or the scope of the FCC regulations considered in these Dockets.

- Several contain constructive suggestions that are outside of, but not inconsistent with, the subject matter of this FNPRM and do not require any modification in it.

- No appreciable doubt was cast on the Commission's jurisdiction.

To the extent the comments are grounded in substantive disagreements or concerns, CEA and CERC believe that the alternative courses of action suggested would be inconsistent with the course established by the Commission in these Dockets and, if followed, would make less likely the results intended by the Congress in 1992 and 1996. To the extent comments complain that the FNPRM items are a "package" that would destruct if tampered with, it should be remembered that ***a decade of congressional and Commission action has narrowed the options available to the parties, leaving only this one, viable channel for success***. Accordingly, upon thorough review and appreciation of all of these comments, CERC and CEA continue to urge the FCC to grant expeditious approval and implementation of the measures set forth in this FNPRM, so as to serve consumers, enable competition, and move the DTV and HDTV transitions forward.

I. No Objection Has Been Made To The Provisions Of The Technical Regulations Reviewed In This FNPRM.

There are virtues to relying, as Congress instructed, on due process standards organizations: not a single comment takes issue with or even questions the proposed technical regulations on which comment was asked in this FNPRM.

II. Comments On The Technical Regulations Seek Clarification, Or Expansions Of Their Scope That Need Not Be Addressed In This Proceeding.

To the extent the proposed technical regulations are addressed, the commenters seek affirmation that certain matters are *not* covered, or request that these regulations address items they are perceived not to cover.

A. Some Comments Request Affirmation That Certain Requirements Are Not Imposed.

Several of the commenters simply want clarification or assurance that the regulations will not be interpreted so as to impose obligations on them. The American Cable Association ("ACA") seeks clarification of the 750MHz activated channel capacity threshold, or a longer phase-in period.[2] CEA agreed to this threshold as reasonable, and it is accepted by CERC. Issues as to phase-ins are handled by the Commission pursuant to a well-established waiver process.

TiVo, Inc.[3] would like clarification that support for the IEEE 1394 interface is not required in Unidirectional Digital Cable Products. The proposed regulations are clear that this obligation is imposed only on devices furnished by certain cable operators, and not on Unidirectional Digital Cable Products, via labeling obligation or otherwise.

SBCA and DirecTV both characterize the scope of this proceeding as addressed only to "cable compatibility" issues.[4] This is wrong in two respects: first, to the extent it addresses cable, the subject matter of this FNPRM includes both *compatibility* and *competitive availability* considerations. Second, the considerations pertaining to competitive availability clearly and specifically apply to all MVPDs, not just cable.[5]

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[2] Comments of American Cable Association at 7-8 (March 28, 2003).
[3] Comments of TiVo Inc. at 5-6 (March 30, 2003).
[4] Comments of Satellite Broadcasting and Communications Association ("SBCA") at 3 (March 28, 2003); Comments of DirecTV, Inc. at 3 (March 28, 2003).
[5] SBCA and DirecTV do not pose any substantive objection to the technical regulations.

B. Some Comments Request FCC Action On Issues And Matters Not Properly The Subject Of This FNPRM.

Other comments seek to broaden, rather than narrow, the scope of items published in this FNPRM:

- TiVo[6] would like the Commission to resolve the "2005 date" issue in this proceeding by maintaining it.

- The Electronic Frontier Foundation ("EFF")[7] would like the Commission to use this proceeding to clarify FCC regulations so as to require that digital programming on the "basic tier" must be sent in the clear, and to add related product labeling provisions.

- The National Association of Broadcasters and the Association for Maximum Service Television, Inc.[8] ask that this proceeding address the inclusion of off-air DTV tuners in Unidirectional Digital Cable devices and include a requirement for carriage of certain PSIP data; Sinclair Broadcast Group, Inc.[9] would like the Commission to go further, and include performance requirements as to these and other DTV tuners.

On their merits and in the appropriate context, CERC and CEA have been or would be in favor of some of these proposals, and opposed to others. What they have in common, however, is that the FCC need not, and should not, tarry on them in order to approve and implement the matters before it in this FNPRM. Both CEA and CERC have communicated extensively with the Commission with respect to the "2005 date" issue, which the Commission has now addressed,[10] but neither has sought to have it wrapped up in this proceeding. Despite substantively supportive comments here from TiVo, CEA and CERC adhere to this position.

As was indicated by the February, 2000, PSIP agreement published in the FNPRM, CEA member manufacturers and others may wish to build products that comprehensively rely on broadcast and cable PSIP data in order to furnish a complete electronic program guide in some Unidirectional Digital Cable Devices, and CERC member retailers and others may wish to have this feature included in such products. Similarly, DTV and HDTV manufacturers and retailers have made and sold products that include QAM tuners, the use of which would benefit from

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[6] Comments of TiVo Inc. at 9-12 (March 30, 2003).
[7] Comments of The Electronic Frontier Foundation at 4 (March 28, 2003).
[8] Comments of The National Association of Broadcasters and The Association for Maximum Service Television, Inc. ("NAB / MSTV") (March 28, 2003).
[9] Comments of Sinclair Broadcast Group Inc (March 28, 2003).
[10] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* CS Docket No. 97- 80, Order And Further Notice Of Proposed Rulemaking (Rel. April 25, 2003).

unencrypted basic tier signals. However, it is not necessary, *for the Commission to resolve the issues and challenges presented by this proceeding*, for the Commission to address this question in this FNPRM.

The request by NAB/ MSTV for FCC intervention to require all Unidirectional Digital Cable Products to contain a DTV Tuner seems ill founded and unnecessary in light of several factors. Public statements by many consumer electronics representatives, before and after both the DTV Tuner Mandate and the December 19th filing, have stressed the efficiency and economic benefits of integrating cable and DTV tuning capacities in television receivers.[11] While CEA and CERC, as representatives of competitive manufacturers and retailers, cannot make pledges as to business intentions, their major members have made it very clear that the economics and benefits of including both types of tuning capabilities in the same chip or chip set are manifest for product planning purposes.[12]

Given the potentially dynamic and competitive nature of this market and the focus of this proceeding on enabling competitive entry to the market for MVPD devices, there is no reason for the Commission in this proceeding to reach the arguments, re DTV terrestrial reception, made by Sinclair.

III. Most Of The Comments Directly Addressing The "DFAST License" Seek Clarification That It Does Not Impose Particular Requirements.

As the December 19 joint letter to Chairman Powell observes, the DFAST license itself is not proposed for the status of a regulation. However, its provisions are of significance because, after several years of debate involving FCC proceedings and otherwise, the representatives of the Consumer Electronics industry and of the Cable Industry have agreed that the draft presented to the Commission is a *model* license that does comport with existing FCC regulations that declare the "right to attach" and define and limit the obligations that may be imposed on the licensor. The provisions of this license are, therefore, crucial to achieving the competitive outcome required by the Congress in the context of the regulatory decisions made by the Commission to date, and the Commission has said that provisions of this license are subject to petitions to the Commission on

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[11] *Ex Parte* Presentation of Consumer Electronics Association, Digital Cable Compatibility: Needed FCC Regulations, CS Docket No. 97-80 and PP Docket No. 00-67 (Sept. 11, 2002); *Ex Parte* Presentation of Matsushita Electric Corporation of America, Memorandum to the Federal Communications Commission, CS Docket No. 97-80 (Aug. 23, 2002); Letter from Robert A. Perry to Hon. Michael K. Powell, Federal Communications Commission, CS Docket No. 97-80 (Aug. 1, 2002).

[12] "Asked why the CE-cable agreement didn't include any provision for over-the-air tuners, [Mitsubishi Digital Electronics America Vice President Robert A.] Perry said the question didn't enter the negotiations because, he believed, no manufacturer would be crazy enough to build a TV set only for cable, but without the capability of receiving over-the-air or satellite TV. The idea that any manufacturer would do so, he said, was 'absurd' and 'an insane business model.'" *Consumer Electronics Daily*, April 8, 2003.

this basis.[13] The license itself also provides for growth and change through a process that involves appeals of certain issues to the Commission. Both the model nature of the license, and its capacity for change, help to resolve many of the concerns raised in comments.

Of the comments on the license itself,[14] the largest number are simply seeking assurances that it does *not* contain particular requirements:

- TiVo seeks assurance that the DFAST license is available for recording devices, allows the incorporation and use of cable modems, and does not mandate inclusion of a 1394 interface in Unidirectional Digital Cable Products. It also seeks clarification that such a product may employ more than one POD, and that the POD output will be "standard MPEG."

- The "PC commenters"[15] wish to confirm that the DFAST license does not exclude the licensing of PCs and other "bidirectional" products, and that it does not allow CableLabs to mandate the use of, and response to, a video "Watermark."

- Intel separately complains that the DFAST license has not been made available to any potential licensee.[16]

- Public Knowledge and Consumers Union[17] seek clarification that the license does not "impose" use of "5C" technology and will not disfavor PCs.

As a participant in the negotiation of the model DFAST license, CEA can affirm its understanding, and the understanding of the parties, re DFAST:[18]

(1) DFAST does cover recording devices and any other product that works consistently with the Compliance and Robustness rules. That is one of its great competitive benefits, and one that was sought by Members of Congress as early as 1992.

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[13] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling, 15 FCC Rcd 18199 (Rel. Sept. 15, 2000) ("Declaratory Ruling"), par. 29.

[14] Many of the complaints purportedly directed at the proposed regulation on Encoding Rules are in fact more properly directed at the "Compliance" and "Robustness" rules of the DFAST license; these are discussed further below.

[15] Comments of ATI Technologies, Inc., Dell Computer Corporation, Hewlett-Packard Company, Intel Corporation, Microsoft Corporation, and NEC Corporation ("PC commenters") at 3-6 (March 28, 2003).

[16] Comments of Intel Corporation at 5-6 (*Erratum*, April 16, 2003).

[17] Comments of Public Knowledge and Consumers Union ("PK/CU") at 5-7 (March 28, 2003).

[18] These understandings are accepted and endorsed by CERC and its members.

(2) DFAST similarly allows the incorporation and use of cable modems. The parties understood that the term "Unidirectional" is meant to exclude only the use of the return path to the cable headend for the purpose of specific signaling in the context of cable television and ancillary services. It is *not* meant to exclude, *e.g.*, incorporation of a modem for access to the Internet via broadband connectivity provided by cable modem service, DSL, or other services.

(3) While the proposed technical regulations require certain *cable operators* to support the "1394" interface, neither those regulations nor the DFAST license requires its incorporation in a Unidirectional Digital Cable Product.

(4) There is no restriction on the number of PODs that a product may be designed to accept; the output is "standard" MPEG.

(5) Nothing in the DFAST license excludes PCs owing to their inherent bidirectional capacities or incorporation of, or connection to, modems. As is discussed below, certain PC operations require interpretation of the Compliance and Robustness Rules.

(6) The DFAST license provisions on Watermarks pertain only to Compliance Rule obligations to prevent the *obscuring of,* or other means to eliminate or nullify, a Watermark that may be identified in the future by CableLabs, not any obligation to read an react to such a Watermark.

(7) The DFAST license does not require the use of "5C" technology. For both interfaces and recording, it contains Compliance Rule provisions requiring CableLabs to consider, on an objective and expeditious basis, all technologies presented to it, and for appeal to the FCC if CableLabs refuses to accept a technology. These provisions were of great importance to the Consumer Electronics negotiators.

(8) CEA and CERC believe that the DFAST license is not yet available principally because its Compliance and Robustness rules depend on the implementation of the Encoding Rule regulation, and on the appeal processes to the FCC by which it settles change management issues. CEA and CERC members share the urgency of Intel's concern that this license, which was the focus and fulcrum of all of the "Plug & Play" negotiations, be made available in a time frame that coincides with compliance with the FCC's DTV Tuner mandate. CERC and CEA understand that, for many manufacturers, such a schedule would require basic production decisions to be made by July 1, 2003, for product distributed by July 1, 2004.

IV. Many Of The Comments Aimed At The "Encoding Rules" Actually Address Requirements Of the DFAST Compliance And Robustness Rules And Require No Changes Therein.

Ironically, much of the fire directed at the "Encoding Rules," which constrain content provider impositions on consumers, comes from commenters who are objecting to the need for *any* impositions on consumers at all. These comments, and similarly misdirected ones from those complaining of *insufficient (Compliance Rule)* impositions on licensed devices, reveal a fundamental misunderstanding of the purpose and necessity of the Encoding Rules: ***These Encoding Rules are entirely for the purpose, and of the effect, of limiting and tempering the consequences for manufacturers and consumers of the Compliance and Robustness rules in MVPD device licenses, which are largely dictated by content providers. The FCC has recognized that, because the POD-Host Interface eliminates any other privity of contract of content originators / distributors with device manufacturers, copy-protection-related constraints on those manufacturers can be imposed*** only ***through a regulated license for the OpenCable technology that the FCC directed the cable industry to deploy to satisfy the requirements of Section 304. The only practical way to limit the triggering of such constraints by content providers, who are not principal parties to such licensees, is via Encoding Rules.***

A. Many Commenters Are In Fact Complaining Of The Imposition Of Copy Protection In The Compliance And Robustness Rules, Not Of The Limitations On Copy Protection In The Encoding Rules.

The PK / CU comments begin the attack on Encoding Rules by objecting to the need for "a DFAST … license that locks in a particular content protection technology at the expense of other technologies …"[19] While the comment is logically consistent (if no license, no need for Encoding Rules), adherence to it would require the FCC, at this late date, to reverse two core decisions that have been the basis for years of work by all parties involved:

- the decision in the 1998 Report and Order, confirmed on Reconsideration, to delegate to CableLabs and the cable MSOs the development of OpenCable specifications and the licensing of competitive entrants;[20] and

[19] Comments of PK/CU at 3 (March 28, 2003).

[20] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775 (Rel. June 24, 1998) ("Report & Order"); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order on Reconsideration, 14 FCC Rcd 7596 (Rel. May 14, 1999).

- the September, 2000 Declaratory Ruling (par. 28) that declared that *some measure* of copy protection restraint may be imposed in such a license, subject to complaint to the Commission by petition.

Unless the Commission were to reverse itself on these core determinations, the *only* way to address the substantive concerns advocated by PK/CU is through Encoding Rules, either in the DFAST license itself (where they would be reviewable by petition to the FCC) or via this regulation. The former option is infeasible because there is no calibrated remedy available for violations by third-party beneficiary content providers, and because it would not achieve the "level playing field" advocated by all parties and the Commission.[21]

Similarly, TiVo argues that "[t]here is absolutely no need to condition the availability of new navigation devices on copy control rules" and that "[c]opy protection and copyright issues should be negotiated by private agreements."[22] This position is misdirected into opposition to the Encoding Rules (which limit content provider triggering, *not* the capacity of devices) and would require the FCC to reverse its Declaratory Ruling.

EFF argues that "the need for 'content protection' should not be the basis for any independent encryption obligations on the part of cable MSOs in the basic tier context" and that any "content protection" should be addressed exclusively in the Commission's "broadcast flag" proceeding. Again, adopting this position would require a reversal of the FCC's Declaratory Ruling determination that copy protection may be a species of conditional access. This view also ignores the fact that the Broadcast Flag proceeding is *not* directed at any home recording issues (though is alleged to have collateral effects thereon), so would not be an appropriate place to address home recording limitations of the Compliance Rules, and the need for counterbalancing Encoding Rules.

[21] *See* discussion in CEA/CERC Comments at 20-21 and in Part V.B., further below.
[22] Comments of TiVo at 8 (March 28, 2003).

B. Similarly, Those Who Want Further Constraints On Consumers Misdirect Their Attention And Complaints To The Encoding Rules.

Just as those battling for greater consumer freedom misdirect some of their fire at the Encoding Rules, so do those arguing for additional consumer constraints. The Motion Picture Association of America lays at the door of the *Encoding Rules* its complaint that "the agreement perpetuates the use of unprotected analog outputs for such content without a means for retirement of such outputs or constraint of the images transmitted over them. *** [O]ne means of addressing the analog reconversion problem may be to retire analog connections in future private licensing agreements. The proposed regulation prohibits such efforts. *** Until analog connections are banned by law or regulation, this provision would prevent private agreements to retire them."[23] Similarly, MPAA complains that the *Encoding Rules* do not allow "privately negotiated, flexible arrangements by which a system-wide hack of a technology protecting an output could be addressed. This is a fatal flaw, particularly given that the proposed regulation affords content owners no choice as to the outputs they must use to deliver their programming to consumers."

These arguments appear to be based either on a fundamental misunderstanding, or a basic mischaracterization, of what the Encoding Rules address and provide for. These arguments are made in advocacy of "Selectable Output Control" ("SOC") and "Downresolution," which indeed are addressed in the Encoding Rules. But the MPAA arguments defend neither. The Encoding Rules have nothing to do with whether analog outputs are "retired" in products, or whether the DFAST or other licenses will authorize particular outputs. What the Encoding Rules address is the application of codes by content providers or distributors, on a program-by-program basis, so as to *activate triggers to deny to particular consumers, on an unpredictable program-by-program basis, the receipt of programming they have already paid for, through interfaces in products they have already bought.* Whether or not these outputs may appear on devices, and how they function if they do, is governed by the license's Compliance and Robustness rules -- as to which, the MPAA observes, "***the Commission wisely elected to rely on the OpenCable project managed by CableLabs to develop the requisite standards and licenses***"[24] -- *not* the proposed Encoding Rules.

Similarly, MPAA dresses as an "Encoding Rule" issue its (factually incorrect) claims that there are no technology revocation procedures contemplated or available to address a "systemwide hack." Again, MPAA is angling for SOC and Downresolution as if they were species of technical interface protection

[23] Comments of the Motion Picture Association of America, Inc. ("MPAA") at 4, 10 (March 28, 2003).
[24] *Id.* at 4 (emphasis supplied).

measures (which are in fact governed by the Compliance Rules), rather than as the *ad hoc* impositions on consumers that are banned under the Encoding Rules.[25]

V. The DFAST Compliance And Robustness Rules Were The Subject Of Vigorous Negotiations To Achieve, In Combination With The Encoding Rules, A Pro-Competitive Balance Between The Concerns Of Content Owners And Distributors And The Expectations Of Consumers And Competition.

The Compliance and Robustness Rules of the model DFAST license, in combination with the Encoding Rule regulation, provide for a balanced regulatory outcome. The history of these Dockets leaves no doubt that these Compliance Rules are every bit as much the subject of regulation as are the Encoding Rules. Yet without these Encoding Rules, they provide an incomplete result.

A. The Compliance And Robustness Rules Provide For Protections, Including Copy Protection, That The Commission Has Ruled May Be Classified In Its Regulations As Guarding Conditional Access Rights.

The objections to the Encoding Rules, by MPAA and others, as treading on rights that should be left to "private agreement" run into the same historical and factual obstacles that sink the "pro consumer" arguments of those who say there should be no "copy control" limitations at all in DFAST: This is not what the FCC ruled in 1998, when it delegated the development of attachment specifications to CableLabs; and it is not what the FCC decided in 2000, when it said that such specifications may include copy protection measures. Nor is an entirely "private" solution what the MPAA and its members argued for when the right to impose such limitations, through "DFAST" or "PHILA,"[26] was in question.

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[25] The fact that the Compliance rules *do* contemplate revocation measures is discussed below in Part VI.B.

[26] Originally, the license for the security across the POD-Host interface was called "DFAST," after the patent being licensed. During initial negotiations with consumer electronics manufacturers, CableLabs changed the name to "PHILA" -- the "POD-Host Interface License Agreement." During the negotiations leading up to the "Plug & Play" agreement, the model draft license focused on standards related to the DFAST technology, so this instrument was called "DFAST," whereas the instrument currently available to manufacturers is broader, has different provisions, and is called "PHILA." Hence, generic arguments about the scope of CableLabs licensing authority may, at various points in time, have referred to "PHILA" or "DFAST," but the underlying FCC regulations being interpreted are the same in either case. The terms "PHILA" and "DFAST" are used in this Part with this qualification and understanding.

1. Those now arguing for "freedom of contract" insisted on mandatory contractual impositions via the DFAST or PHILA compliance rules.

The MPAA and its members, who now complain that copy protection outcomes should be left to "private agreement," were among the earliest advocates of the required *inclusion* of copy protection provisions in DFAST/PHILA, pursuant to the Commission's official delegation of attachment specification authority to CableLabs. According to an *ex parte* letter[27] dated December 9, 1998, the MPAA and five of its member companies made a presentation to FCC staff seeking the recognition of certain "principles" in FCC governance of MVPD "licenses":

- "Content and service providers should have the technological capability of copy management …."
- "Authorizations to descramble should be provided by means of licensing agreements …."
- "Such licensing agreements must require devices that descramble to prevent transmission of in-the-clear content to other devices that are not licensed or otherwise obligated to obey copy management instructions."
- "Protocols and standards need to be developed that will support the above copy management terms of use principles. These protocols and standards need to be made widely available on fair an non-discriminatory terms ***for implementation by all relevant parties -- including hardware manufacturers, system operators and content providers***. Substantial progress is, in fact, being made and we expect will continue to enable prompt deployment of DTV.

More specifically about cable and the "POD Interface," the MPAA said:

> "POD interface -- Content providers have been regular participants in OpenCable meetings and continue to work closely with OpenCable on technology attributes. *** OpenCable may be under impression there cannot be encrypted link across interface from POD to box because Commission prohibits 'security in the box.' The Commission said just the contrary in its Navigation Devices Report and Order"

Clearly, the MPAA and five of its members, in this filing, recognized that the POD-Host interface was (1) governed by FCC rules, (2) delegated for specification development to CableLabs, and (3) the fulcrum for copy protection further downstream. MPAA and its members were also arguing, as they had

[27] Letter from Fritz E. Attaway to Magalie R. Salas (Dec. 9, 1998) (emphasis supplied).

repeatedly, that the same regime needed to apply with reference to all MVPD practices and programming, and to "all relevant parties."

2. DBS outcomes were and remain a necessary point of reference for those seeking copy protection in the DFAST license.

The MPAA, in its Reply comments prior to issuance of the September 2000 Declaratory Ruling, emphasized that different regimes applying to the same windowed comment were unacceptable. It said, "In the case of MSO-supplied boxes, content owners can seek, [through] fair bargaining, content protection in individual negotiations with program suppliers. In the case of boxes to be sold at Circuit City and other retailers, content owners cannot bargain for content protection since neither they nor the cable companies (as the owners' licensees) have privity with the box manufacturers.[28]

Almost two years later, on June 5, 2002, the MPAA replied to the FCC staff's questions distributed at a May 10 industry roundtable ("Hoedown") meeting re the "PHILA" license. Throughout the "Hoedown" oral discussions, the "satellite" case was advanced by both cable and motion picture representatives, for the proposition that the available restrictions in each MVPD context had to be the same. In answer to the question posed at the last such session, to which written answers were requested by the FCC staff, "Should cable and satellite be operating under similar rules?" MPAA said:

> "It is certainly understandable that cable operators would not want competing delivery systems such as Satellite to have greater rights protection options than they have, because it would give such competing systems a competitive advantage in obtaining content."[29]

[28] Reply Comments of MPAA, PP Docket No. 00-67 (June 8, 2000) at 4.

[29] Letter from Fritz E. Attaway to W. Kenneth Ferree for inclusion in Dockets 97-80 and 00-67, Attachment: MPAA Responses to May 10 PHILA Hoedown Questions Relating to Copy Protection at 1 (June 5, 2002). However, now having in hand the September 18, 2000 Declaratory Ruling, allowing copy protection in MVPD compliance rules, MPAA would not explicitly commit to a balanced regime covering satellite, as well as cable services, because clearly MPAA wanted to maintain leverage to play satellite and cable providers off against each other by holding out for greater and greater limitations on consumer use. This approach is discussed further below re the Starz comments.

3. Content providers have stated explicitly that (1) DFAST is essential to retail devices, and (2) under inconsistent rules they will not provide content to certain devices.

On September 6, 2000, MPAA made a written presentation to FCC Commissioners and staff that specifically identified the "DFAST" license as the *only* vehicle for "copy management" in retail devices. The one-page submission concluded (emphasis in original):

> **If the DFAST license does not include copy management obligations, consumers who purchase retail devices without copy management will not receive secure content.** There is no middle ground here, or gray area. Either devices will respond to copy management instructions, or they won't. If they won't, they cannot receive high value, copy protected content. This is why the DFAST license must include copy management requirements. Without them, consumers will be adrift in a sea of uncertainty as to whether they will be able to receive high value content.[30]

Again, MPAA's key points were that (1) the DFAST license is the linchpin for *all* copy protection outcomes for retail devices, and (2) it is essential that the same outcome apply for *all* regulated distribution regimes for the same content.

B. The Encoding Rules Provide Limitations On The Use Of Such Protections By Content Providers, As The Only Way To Achieve A Balanced Outcome.

With the MPAA and its members having successfully stressed to the Commission that (1) it is essential for a DFAST license to contain Compliance and Robustness rules that invoke copy protection, or there can be no user parity among platforms or services, (2) these Compliance and Robustness Rules must be officially sanctioned as "conditional access" under FCC licensing regulations because there is no other way to bridge the "privity of contract" gap posed by the POD-Host Interface, and (3) copy protection outcomes for cable and satellite delivery must be equivalent, or consumers receiving one of them "cannot receive high value, protected content;" one might have expected that MPAA and its members would welcome a complementary Encoding Rule regime, based on their own prior negotiations, to provide the balance and predictability that these interests have also advocated. Unfortunately, however, these commenters, joined by the National Association of Music Publishers, now return to the mantra of

[30] Letter from Fritz E. Attaway to Magalie R. Salas, PP Docket No. 00-67, CS Docket No. 97-80 (Sept. 6, 2000).

seeking unconstrained "private agreements" whenever and wherever "copyright" is involved.

These commenters argue, essentially, that property that is subject to copyright can be subject to no other regulatory regime. The Commission's very existence refutes this notion. Most broadcasts are copyrighted, and broadcast rights are alienable private property, yet broadcasting is regulated, as is the alienation of broadcast licenses. Having sought and achieved classification of copy protection as a species of "conditional access" under FCC regulations, these commenters cannot now shrink from the Commission's obligation to apply its regulations in a balanced manner.

The proposition now advanced by these content owner commenters is that they are entitled to receive the benefit of government action entrusting CableLabs with the sole control of the licensing of competitive entrants; government action giving CableLabs the right to impose copy protection outcomes on consumers; and government action to enforce their own requirements to dictate the content that devices "cannot receive;" but that their own product is *immune* from any complementary regulation that would moderate the absolute power over devices and consumers that such a regime otherwise would grant.

Compliance and Robustness rules without Encoding Rules are the opposite of balance and fairness, attributes that all parties have cited as essential to any copy protection outcome. Both the consumer electronics parties and the cable operators have found Encoding Rules to be essential to their ability to reach any balanced outcome in the Plug & Play negotiations, and MPAA itself has stressed that such rules cannot effectively be included in the license itself.[31] Accordingly, in objecting to the necessity and role of Encoding Rules, these commenters are seeking effectively to destroy the regulatory outcome for which they have so long pleaded.

MPAA and its members have argued that balance must be achieved across *platforms*, as well as in the practices of cable operators. Throughout the "Hoedown" roundtable discussions, MPAA repeatedly made reference to practices in the DBS industry, as relevant to the FCC's consideration of "PHILA." Debates over what exactly these practices were, and their potential significance for the availability of content, were a constant in such discussions. MPAA and its members have repeatedly insisted that, as mere third-party beneficiaries, they themselves cannot be subject to restrictions in the DFAST license. Therefore, the *only* way to achieve the parity that they seek is through an Encoding Rule regime.

[31] Comments of MPAA at 7 (March 28, 2003).

VI. The Objections To the Compliance and Robustness Rules And To The Encoding Rules Are Not Well Founded.

While many of the comments concerning the Compliance and Robustness rules and the Encoding Rules were misplaced or misdirected, several do reflect substantive disagreements or concerns. In many cases, these can be addressed by the parties themselves without the necessity of modification to anything pending before the Commission. In all cases, there is no need for modification to the documents on which the Commission has requested comment.

A. The Concerns Expressed By Those Who Believe The Compliance And Robustness Rules Are Too Restrictive On Device Design Do Not Warrant Revision To Anything Pending Before The Commission.

The PC commenters discuss concerns about the provisions of the DFAST Compliance and Robustness rules:

- They praise the license provisions for determining whether new technologies adequately protect content as "a fair context," but ask the Commission to "spell out for CableLabs precisely what these objective criteria should be," and ask for a mechanism for periodic reviews and updates.[32]

- They ask the Commission to clarify that Robustness rules requirements for protection of keys and cryptographic secrets not be interpreted as "absolute," and request an expanded definition of "new circumstances."[33]

- They seek clarification of certification requirements in the context of PCs.[34]

- They seek clarification of the Robustness constraints on storage of display buffers, as they may pertain to PC graphics subsystems, and of the possible robustness limitations on transporting data to recording drives over internal PC buses.[35]

In evaluating these concerns and requests for clarification, it is important to keep in mind that the version of the DFAST license presented to the Commission is a *model* version, which the parties mutually agree will comply with FCC rules, but it is not the only possible version of a DFAST license. It is,

[32] Comments of PC commenters at 9-10 (March 28, 2003).
[33] *Id*. at 12-14.
[34] *Id*. at 5.
[35] *Id*. at 5-6.

to be sure, part of a framework that is tightly wrapped with the technical and Encoding Rule regulations that are also proposed, but even in this context it is subject to interpretation and improvement.

The PC commenters do not question the need for robustness rules, nor do they object fundamentally to the "Plug & Play" agreement's balance between the Compliance and Robustness rules, on the one hand, and the Encoding Rules on the other. The issues of clarification, interpretation, and development that they have raised are for CableLabs' initial consideration and possibly FCC consideration at a later stage in the process. It would be premature for the FCC to undertake the sort of elaboration that is requested before these licensing processes, including the FCC's role in resolving disputes, are in place.

B. Concerns Expressed By Those Who Believe The Compliance And Robustness Rules Are Not Sufficiently Restrictive On Device Design Do Not Warrant Revision To Anything Pending Before The Commission.

MPAA and its members also have a list of perceived Compliance rule deficiencies; some expressed as objections to the Encoding Rules and some properly classified. These also do not require the Commission to make or order any changes to any the documents on which it has sought comment. MPAA complains that the Compliance Rules:

- should provide for the "retirement" of component analog outputs and for additional "tools" (Selectable Output Control)
- should provide for "revocation" of devices
- should provide for "image constraint"
- should require the "binding" of all temporary recordings
- should not allow for "multiple moves" of first-generation recordings
- should specifically address "redistribution"
- should require generation of "CGMS-A" in analog outputs
- should specifically require use of "HDCP" with "DVI"

Several of these objectives are already accounted for in the context of the Compliance Rules. Others represent objectives that MPAA and its members have disclaimed, have never raised, must pursue elsewhere to be effective, or are simply not entitled to as a matter of public policy:

- In previous filings[36] in these Dockets, MPAA *disclaimed* any desire to **retire or eliminate analog outputs**; at least until some comprehensive regime that takes into account legacy considerations could be established. To both the Commission and the Congress, MPAA has *disclaimed* any desire for Selectable Output Control tools. The mandatory permanent or selective "retirement" of outputs in these Compliance rules would make orphans of millions of devices purchased in good faith by consumers.

- Device **revocation** is, in fact, available both for the POD *and* under secure interface technologies such as DTCP and HDCP. MPAA's use of "revocation" in the present context represents an attempt to find a justification for a different technical measure, Selectable Output Control, in light of its prior written assurance to the Congress that it was not seeking this power.

- MPAA argues that "**image constraint**" is an appropriate imposition in the DFAST license because it is available, under defined circumstances, in the DTCP license. As CEA and CERC note in our March 28 comments, however, in the "5C" context such constraint is a *secondary* measure, because one with a 1394 home network is likely also to be employing a digital display and recording interface that would not be subject to "downres'ng." By contrast, in the DFAST context, the Component Video interface is the *only* available High Definition interface on most of the 4 million-plus large screen displays sold to date. Allowing it would leave these transition pioneers with ***no reliable means of receiving HDTV***.

- The Compliance Rules were negotiated at length to require **binding** of recordings as necessary to preserving the copy protection states, which are the same states requested and approved by MPAA in other contexts. It should not be necessary, *e.g.*, to further "bind" a recording to an embedded "hard drive" that cannot be removed from a product.

- MPAA's objection to "**multiple moves**," within a home network, of 1-generation content in the context of DFAST is difficult to understand. MPAA and its members have long accepted that, in the context of "one generation" copying (copies may be made but not copied), an initial copy -- *e.g.*, on a hard drive that cannot be removed from a set-top box -- may be "moved" to another recording medium, so long as the copy that was initially made is erased or is no longer available. MPAA has never objected, in any other context, to multiple moves so long as only a single copy is available for use at any one time. Nor should it.

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[36] MPAA Responses to May 10 PHILA Hoedown Questions Relating to Copy Protection, CS Docket No. 97-80, June 3, 2002; *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment,* PP Docket No. 00-67, Reply Comments of MPAA at 4 (June 8, 2000).

- The secure digital interface technologies accepted or to be accepted by CableLabs would guard against "**redistribution**." Indeed, the rationale for the Broadcast Flag proceeding is that such protection *is* available in licensing contexts such as DFAST, but is not available in the case of broadcasts received via antenna.

- MPAA has never before to CEA or CERC's knowledge requested the generation of **CGMS-A** in the context of the DFAST license. It seems clear from MPAA's filing that it is hoping that leverage from demands, and the threat of delay, in this proceeding may be used to obtain results in a more appropriate congressional context. A CGMS-A regime would be effective *only* in the context of a comprehensive obligation on all defined downstream devices, whether or not they receive content from MVPD devices, to read and respond to status markings. This clearly is the purview of legislation; there is no point to modifying or holding up these matters before the FCC in the interim.

- The use of **DVI** with or without HDCP copy protection is controlled by license. In context, the requirements of the DFAST Compliance Rules provide assurance that content passing over a DVI interface will not be copied.

In summary, MPAA, like the PC commenters, brings a number of concerns to the table. Several are already addressed and several require clarification through interpretation only. The others represent long-term policy positions that cannot be effectively addressed in the context of this proceeding, or should not be.

C. The Encoding Rules Provide The Proper Balance To The Compliance And Robustness Rules And Are Consistent With A Decade Of Inter-Industry Dialog.

It is telling that although the Encoding Rules are based on formulations agreed to by the motion picture industry and oft-cited by them to the FCC, it is the other concerned industries in this proceeding -- the broadcasters and the PC commenters -- who have little or no problem with them. These Encoding Rules follow the "windowing" approach that specifies that programs originating as free, terrestrial broadcasts should always be freely copiable and never subject to Downresolution or Selectable Output Control. Yet the NAB / MSTV comments express no concerns over them. Similarly, the PC comments and the separate comments of Intel support these rules, but express "concerns" that they not be swallowed by exceptions. The concerns of the MPAA and DBS commenters are directed mainly at the fact that they exist at all, and, specifically, at last ditch efforts to justify Selectable Output Control and Downresolution.

1. Concerns expressed by those seeking greater consumer flexibility should not result in modifications by the Commission.

Several commenters did complain that the Encoding Rules are not sufficiently protective of consumers. Indeed, the comment received from a member of the cable programming industry is also generally supportive, but requests a *less restrictive* rule in the case of certain programming: Starz Encore Group ("Starz," or "SEG"). Starz provides a "Subscription On Demand" service that the Encoding Rules would *allow* to be coded as "copy never" when distributed. Clearly, as Starz, in its eloquent and precise comment clearly understands, as a programming distributor would still have the *option* of coding its programming as "one generation" or, if it wished, "freely copiable." Starz, nevertheless, complains that the rules (and the "5C" outcomes on which they are based) misinterpret the nature of its service as "video on demand." Therefore, Starz seeks to have the ***no-copy option removed from its own discretion***. Why would a programmer request to have *less* flexibility over consumer usage? Starz supplies a candid and definitive answer in its conclusion:[37]

> The Commission should not set rules, which permit copyright owners, through their agreements with SEG, to counteract the reasonable and legitimate expectations of consumers and the guidance provided by the Congress. For these reasons, SEG urges the Commission to shift the classification of Subscription-VOD services from Copy Never to Copy Once if the Commission determines to adopt Encoding Rules as proposed by the MOU. SEG also requests that the Commission clarify that the number of copies permitted under the Encoding Rules must be counted from the consumer's perspective, that is from the time the content has been viewed by the consumer.

The PC commenters seek an absolute ban on downresolution, as well as Selectable Output Control (a position in agreement with the CEA/CERC comments). However, with respect to downresolution, they misunderstand the Encoding Rules' silence, in provisions other than as to free terrestrial broadcasts, as allowance. The transmittal letter to the Commission makes clear that in this case the silence is meant to indicate that the FCC should craft the outcome in the document. They seek to clarify the standing requirements for participation in FCC procedures with respect to the Encoding Rules and express concern over the effect of petitioned-for changes on "the terms of the DFAST license," and seek clarification of the "public interest test" that is provided for. They ask that the "bona fide trial" provision be rejected or explicitly time-limited, and

[37] Comments of Starz Encore Group LLC at 22 (March 28, 2003).

apply to Undefined Business Models only, because "[a]s currently drafted, the exception threatens to swallow the rule."

Intel comments, "We are concerned that the substance of the encoding rules, which we support, will be swallowed by the exceptions to the general rules: 1) the proposed system contemplate[s] a means for cable-operators to change the rules, and 2) the encoding rules [do not] apply to bona-fide trials (whatever that means). *** We encourage the Commission to consider these exceptions with considerable skepticism.[38]

PK / CU also condemn downresolution "primarily because consumers will resist and disfavor technologies that deliberately reduce quality of the presentation of television content." They brand it as "logically incoherent" and note that with respect to Internet retransmission, "we would not think it prudent to 'protect' content owners by making their content four times easier to copy and retransmit." While they oppose any Compliance or Encoding rules as unnecessary, they argue that any content restraint that is sanctioned by Encoding Rules should be accompanied by a warning label to consumers.[39]

The Home Recording Rights Coalition, in supporting approval of the FNPRM documents generally, supports the Encoding Rules as a necessary counterweight to the impositions that the FCC has ruled may exist in license Compliance rules. Like the PC commenters, Intel, and PK / CU, HRRC argues that downresolution is illogical in the context of redistribution concerns, and that the ban on downresolution should apply across the board.[40]

DirecTV, though it opposes the Encoding Rules generally on the basis that it would want the option of additional tools to entice content providers, also complains that the "encoding rules proposed do not address or take into account … the 'fair use' rights of consumers."[41]

CERC and CEA are deeply sympathetic to the comments of Starz, and to the reasoning, grounded in the Supreme Court's *Betamax* holding, advanced in support of them. Indeed, these comments illustrate why Encoding rules are necessary, and why, particularly, they must apply to all MVPD distributors: otherwise, the ability of content owners to license only those who employ the most restrictive "tools" will soon snuff out settled consumer expectations. Yet these comments also illustrate that the Encoding rules reflect (1) an outcome, based on years of industry negotiations, in which no party entirely got its way, and (2) a model in which the baseline undertakings of the motion picture industry

[38] Comments of Intel at 12 (March 28, 2003).
[39] Comments of PK/CU at 16-17 (March 28, 2003).
[40] Comments of HRRC at 9-10 (March 28, 2003).
[41] Comments of DirecTV at 6 (March 28, 2003).

still predominate. CERC believes that this model must be the starting point; Starz can still make use of the petition process, once the rules are in force, to argue that the service in question should not allow for the restrictive outcomes that it fears content providers will seek to impose on it. Perhaps, given the potential leverage of filing such a petition, Starz will have sufficient bargaining power with content providers to encode its programming as its own programmers, rather than the studios, see fit.

CEA and CERC agree with all of the comments seeking a complete ban on SOC and downresolution practices.[42] Re Encoding Rule procedures, while initiation of a Complaint is limited to manufacturers and top level distributors of the devices whose operation would be affected, the rules provide that the proceeding must be open to the comments of others, including a formal round of "reply" comments in which any person may participate. This encourages the informal resolution of disputes among parties to licensing agreements over Encoding Rule provisions that are complementary to licensing terms, so avoids issues needlessly arising for Commission review.

Several comments complain of the "bona fide trial" exception. In discussing this provision with cable representatives, CEA and its members found that attempts to define or limit this exception, in advance, ran up against its inherently experimental nature. CEA and CERC are confident that this provision, which also ameliorates some of the "business model" concerns expressed by DBS commenters,[43] will not be abused. However, abuse of this provision, or any other abuse under the rules (*e.g.*, failing to file a petition or give notice with respect to a change) is specifically made subject to provisions for expedited appeal to the Commission. Hence, it is not necessary to attempt to formulate a definition, or to provide for sanctions for potential abuse, in advance.

As to the "public interest" test that the PC commenters would like to see clarified, CERC and CEA note that the "reasonable and customary expectations of consumers" are specifically stipulated as a guiding factor in applying this test. From CEA's perspective in the discussions with cable operators, this was a key requirement. And, though (as was noted by HRRC in its comments[44]) neither this nor any Encoding Rule formulation can directly emulate the "fair use" considerations cited by Starz and DirecTV, the inclusion of this metric is vital to the preservation of fair use considerations in any balanced outcome.

Re the "labeling" suggestions made by the PC commenters and PK / CU, CEA and CERC believe in the context of clear and stable Encoding Rules that apply to all MVPD platforms, consumers are not likely to be surprised, so any labeling should be voluntary.

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[42] CEA/CERC will provide an appropriate draft of a version that supports the outcome they recommend.
[43] Comments of SBCA at 5-6 (March 28, 2003); Comments of DirecTV at 8-9 (March 28, 2003).
[44] Comments of HRRC at 3-5 (March 28, 2003).

2. Concerns expressed by those seeking greater power to inhibit consumer choice should not result in modifications by the Commission.

CERC and CEA believe that the concerns expressed by those who would want the Encoding Rules to allow additional impositions on consumers also should not result in any changes to the text on which the Commission has sought comment. These are:

- SBCA[45] and DirecTV[46] argue essentially that each MVPD ought to be able to bid for content using the capital of potential constraints on consumers, including Selectable Output Control and downresolution as enticements to content providers to favor their own platform, and not others, with content, though SBCA makes no specific complaint about Encoding Rule outcomes. DirecTV argues that Selectable Output Control is essential to prevent *any* content from traveling over a "1394" or "USB" interface for *any* purpose. DirecTV also argues that programming such as the "NFL Sunday Ticket" cannot be classified as an "existing business practice" under the Encoding Rules.

- MPAA[47] and NMPA[48] make similar arguments in favor of determining consumer rights and expectations, and limitations on the licensed functioning of products under a statutorily mandated regime, by "private agreement" only among content owners and distributors.[49] MPAA objects that the Encoding Rules do not undertake to solve its legislative "analog hole" concerns. And, whereas others argue that the Encoding Rules adhere to slavishly to MPAA outcomes negotiated with the "5C" companies, the MPAA poses a standing objection to any detail in which the Encoding Rules are different.

CEA and CERC believe that FCC regulations that delegate to CableLabs licensing power over the attachment of competitive devices, and that allow the resulting licenses to include copy protection constraints, cannot allow consumer enjoyment and expectations to become the private capital of content providers and distributors, to be bartered, solely among each other, for commercial advantage. This is the result now advocated by MPAA, SBCA, DirecTV, and the NMPA. Nor, to the extent MPAA cannot reach all of its members' concerns through a

[45] Comments of SBCA at 5 (March 28, 2003).
[46] Comments of DirecTV at 6-9 (March 28, 2003).
[47] Comments of MPAA at 7-9 (March 28, 2003).
[48] Comments of the National Music Publishers' Association at 12-14 (March 28, 2003).
[49] MPAA and its members have emphasized, in arguments to the Commission, that in the context of an OpenCable license they have ***no privity of contract*** extending to device manufacturers.

balanced outcome in this proceeding, should this rulemaking be held hostage to a broader legislative agenda as to the "analog hole."[50]

DirecTV's comment that "Selectable Output Control" is necessary to block *all* transmissions over the "1394" and "USB" interfaces because "it is not appropriate for 'copy never' content to be transmitted over those interfaces" betrays a fundamental misunderstanding of the technologies and interfaces involved, as well as of the nature of Encoding Rules, copy protection, and Selectable Output Control. Nobody -- not the MPAA, not any other party -- has argued that a consumer with a 1394 output from a set-top box should not be able to *view* at least some content via a 1394 connection between the set-top box and the display. The copy protection status of the content is irrelevant to this viewing. Nor does anyone question the fact that a 5C-protected 1394 interface will, if it functions correctly, cause "copy never" content not to be recorded. The argument for SOC is that, nevertheless, the content owner may wish to disable the interface on a program-by-program basis, perhaps due to some particular security concern. That DirecTV, the nation's second largest MVPD, can suggest that a sufficient basis for disabling *viewing* is simply that the material is coded "copy never" shows the danger and arbitrariness of the power over consumers that Selectable Output Control and downresolution would convey.

DirecTV also misunderstands the nature of Encoding Rules in its comments with respect to "NFL Sunday Ticket." If unable to categorize such a service, DirecTV would not have "to petition the Commission in order to provide these offerings." The Encoding Rules do not govern the right to offer programming; only the ability to activate certain copy protection triggers, so in no case would DirecTV have to petition to offer the programming. If DirecTV is convinced that a program does not fit a Defined Business Model for copy protection purposes, it still would not have to petition, even for this purpose. Under the Encoding Rules it would have the right to issue a notice as to the copy protection encoding that it will use for an "Undefined Business Model." Depending on what it chooses, it may or may not have to respond to requests for negotiation or a possible complaint as to the status it has chosen. And, DirecTV would never be under any obligation to choose the most restrictive status available.

The similarities to the "5C" encoding rules, complained of by some and lauded by others, arise out of respect for the many years of negotiation in both legislative and licensing contexts that led to the balanced outcomes they represent. The differences arise from differences in context:

[50] CEA notes that, like the other interested associations that include manufacturers, it is a participant in the "ARDG" and that it has previously been a participant in efforts to address reasonable content provider concerns through legislation. These efforts were reviewed in the CEA/CERC comments.

- The primary effect of "downresolution" on viewing in the MVPD context, as opposed to secondary effects on *other* 5C networked devices. (The 5C licenses do not recognize Selectable Output Control.)

- The private nature of "change management," based on license negotiations among only some parties, in the 5C context.

- The need for content distributors, as well as originators, to have a role in establishing new business models, and a voice in changes. These considerations were emphasized by cable industry representatives and are recognized by the consumer electronics commenters.

- The need for the change process to be open to all MVPD programmers, including DBS programmers, to maintain, in accordance with FCC expectations,[51] equal opportunities to acquire programming.

Accordingly, while CEA and CERC respect the inputs and concerns of those who believe the Encoding Rule regulation allows too many restrictions on consumer expectations, and of those who believe it allows too few, we believe that the text submitted to the Commission, as modified to provide for a complete ban on downresolution, strikes an essential and correct balance. In our view, without it, the model DFAST license would no longer be in compliance with FCC rules. Without it, the cable interests have indicated that they would be at a disadvantage in negotiating for programming, so would not offer the DFAST license. In summary, without the Encoding Rules, not only would there be "no deal," there *could* be no deal unless a radically different and more intrusive regulatory regime were substituted for the license and for the rules.

VII. The Jurisdiction Of The Commission Has Not Been Seriously Challenged.

The CEA / CERC comments laid out at length the history of congressional enactments and Commission implementation that provide clear support for the Commission's jurisdiction over the matters on which it has asked comment. Opposed to this comprehensive history are two comments, almost in passing, by the MPAA and the music publisher commenters:

[51] "Should additional evidence indicate that content providers are requiring disparate measures of copy protection from different industry segments, the Commission will take appropriate action." Declaratory Ruling at par. 31.

- MPAA objects to a finding of jurisdiction over encoding rule regulations because adoption "necessarily limits and defines the property rights of copyright owners. As the MPAA stated three years ago, '[t]he Commission obviously cannot regulate what individual content providers may choose to put at risk, what risk, if any, is acceptable, or what price, terms, or conditions a content provider should pay, or assent to, for content protection.'"[52]

- The music publishers reserve comment on the question of Commission jurisdiction, but advises that the Commission should not proceed "without the participation of the Copyright Office."[53]

As CERC and CEA discuss above, the mere fact that programming is copyrighted does not immunize the work and its owners from FCC jurisdiction in any number of respects.[54] Here, the content owners are third party beneficiaries of the DFAST license, have argued to the FCC comprehensively and successfully for inclusion of content protection provisions in the license's Compliance and Robustness rules, have urged on the Commission the central importance of the DFAST license to their entire scheme of MVPD marketing, pleaded their lack of privity of contract with manufacturers of consumers electronics devices that utilize the POD-Host interface, and declared to the Commission that any device that does not respect copy protection technologies "will not receive high value content." Yet the defense against any corresponding limitation on the absolute nature of the right that they wish the FCC to recognize and enforce in its regulations governing such devices is "private property!"[55]

The Encoding Rules do not regulate the price, terms, or conditions under which content providers market their content. What they do is provide balance to a regulated regime for licensed products under a federally declared Right to Attach. Without them, the regime, though federally mandated and overseen, would be completely one-sided and would operate so as to give absolute powers

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[52] Comments of MPAA at 12 (March 28, 2003). The MPAA distinguishes its position here from its affirmation of Commission jurisdiction over the Broadcast Flag: "The regulation of content distribution mechanisms, as opposed to content owner rights, has long been held to be within the jurisdiction of the FCC." MPAA Comments at 13.

[53] Comments of the National Music Publishers' Association, The American Society of Composers, Authors and Publishers, The Songwriters Guild of America and Broadcast Music, Inc. at 20 (March 28, 2003).

[54] *Cf., Building Owners and Managers Association International v. FCC,* 254 F.3rd 89, 96 (D.C. Cir 2001). "Where the Commission has been instructed by Congress to prohibit restrictions on a regulated means of communications, it may assert jurisdiction over a party that directly furnishes the restrictions and, in so doing the Commission may alter property rights..."

[55] The argument is redolent of the objection voiced by Neville Chamberlain's air minister at the outset of World War II, over proposals to bomb certain industrial assets after war had been declared: " 'Oh, you can't do that,' the air minister said, 'that's private property.' " William Manchester, *The Last Lion*, Vol II, p. 578.

to content providers that they have never attained either through legislative outcomes or arms-length private sector negotiations, or in any other regulatory proceeding.

While the Copyright Office at times has been assigned responsibility by the Congress for the administration of particular regimes relating to copyright, it does not automatically or invariably have such a role, in FCC proceedings or elsewhere. Indeed, in the Audio Home Recording Act, cited by the music publishers, the role pertaining to approval of technological measures is given to the Secretary of Commerce, not the Register of Copyrights. While the Register and other government agents are free to advise the Commission through docket filings or otherwise, it would be inappropriate, in the absence of specific congressional delegation, to require such input.

VIII. Conclusion.

There is only one outcome to this proceeding that would be of benefit to American consumers. That is the approval and expeditious implementation of the matters on which comment has been sought in this FNPRM, including an outright ban on the "downresolution" of HDTV content.

Respectfully submitted,

The Consumer Electronics Association
Gary J. Shapiro
President and CEO
2500 Wilson Boulevard
Arlington, VA 22201

The Consumer Electronics Retailers Coalition
Best Buy Co, Inc.
Circuit City Stores, Inc.
Good Guys, Inc.
The International Mass Retail Association
The National Retail Federation
The North American Retail Dealers Association
RadioShack Corporation
Sears, Roebuck & Co.
Tweeter Home Entertainment Group, Inc.
Ultimate Electronics, Inc.

Of counsel:

/s/ Robert S. Schwartz

Robert S. Schwartz
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
202 756-8081

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